UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CARLENE BECHEN, ELVIRA BUMPUS, RONALD BIENDSEI, LESLIE W. DAVIS III, BRETT ECKSTEIN, GEORGIA ROGERS, RICHARD KRESBACH, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN, and CINDY BARBERRA,

Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

PLAINTIFFS' BRIEF IN RESPONSE TO ELECTED OFFICIALS' MOTION TO INTERVENE

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The amended complaint challenges the constitutionality of two state laws establishing the boundaries of Wisconsin's legislative (Act 43) and congressional (Act 44) districts for 2012 and beyond. That complaint already has withstood a procedural and substantive challenge from defendants, members of the state agency that administers its elections. Those defendants, sued only in their official capacity, have been represented from the outset by the Wisconsin Department of Justice. Appropriately so—state law, state boundaries, state agency.

Five Congressmen now seek to intervene to help the state defend the state's law based on their "particular interests" as Congressmen. Their motion no doubt is the first in what may well be a long line of intervention motions—on one "side" or the other—by political candidates and parties, interest groups, and other organizations, each of which has an equal stake in the outcome because this litigation, like redistricting itself, literally affects everyone in the state. With its decision on this motion, the Court will either implicitly encourage wholesale intervention or draw the line where precedent and practicality require. Plaintiffs oppose this motion, and they will oppose any subsequent motion to intervene by any prospective party for any reason.[1]

ARGUMENT

The movants cannot establish their right to intervene under Rule 24(a)(2), nor can they give this Court a credible reason they should be allowed to intervene under Rule 24(b).

I. THE MOVANTS CANNOT ESTABLISH A RIGHT TO INTERVENE.

To intervene as of right, a party must demonstrate: (1) timeliness, (2) a direct, significant, and legally protectable interest relating to the action, (3) potential impairment of that interest if the action is resolved without them, and (4) lack of adequate representation by existing parties. *Reid L. v. Ill. State Bd. of Educ.*, 289 F.3d 1009, 1017 (7th Cir. 2002); *Reich v.*

[1] The three incumbent Congresspersons from the other party no doubt will file a motion to intervene. Plaintiffs oppose that as well. They have no objection to the consolidation with this case of the separate action filed by Voces de la Frontera, Inc. (No. 11-CV-1011).

ABC/York-Estes Corp., 64 F.3d 316, 322 (7th Cir. 1995). The movants' failure to show any one element requires that the motion be denied. *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985).

Plaintiffs stipulate that the motion is timely. They stipulate as well that the movants have an interest—no less and no more an interest, however, than any other citizen. There is no property right in a congressional seat, nor any constitutionally-protected interest in political advantage or success. In addition, the movants cannot demonstrate that the state, defending its own laws, will not adequately represent their interest, however they characterize it.

The Congressmen assert a "legally protectable" interest in their "prospects for re-election" and "their campaigning plans and needs." Mov. Br. 5. In other words, the movants appear as representatives not of the people but of themselves—their re-election "prospects," their "plans," their "needs." The movants' interest in preserving their seats, although direct and (to them) uniquely significant, is not legally protectable or capable of being impaired.

"The existence of 'impairment' depends on whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding." *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982). If the Congressmen had a vested property right in their seats, that interest might be impaired by this litigation. Indeed, the amended complaint is cast as a threat to "the viability of the movants' wishes to continue to serve the citizens in their respective districts." Mov. Br. 7. But susceptibility to challenge in a political office, inherent in democracy, is not impairment for intervention purposes. The resolution of this litigation will not foreclose the movants' rights, because incumbents have no right to their seats—at least no more than any Wisconsin resident age 25 or older and a citizen for at least seven years. U.S. Const. art. I, § 2.

Even if the movants articulated how their interest *as voters* could be impaired, the motion still should fail. The movants have to show "potential impairment of that interest *if the action is*

resolved without the intervenor." *Reid L.*, 289 F.3d at 1017 (emphasis added). By their own admission, the only value added by the movants to this case involves their reelection prospects.

Intervention of right also requires that the movants show inadequate representation by the existing parties. Even if that burden is "minimal," *Meridian Homes*, 683 F.2d at 205, the Congressmen cannot meet it. When defendants and proposed intervenors "have the same ultimate objective," to show inadequate representation the intervenors "must demonstrate . . . that some conflict exists." *Id.* Here, there is no conflict. The movants and defendants share the same goal—to preserve the new district boundaries. "[T]he interests of the original party and of the intervenor are identical," and the adequacy of representation "is presumed." *Solid Waste Agency. v. United States Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996).

The Congressmen do not concede, of course, that their interests coincide with those of defendants. Rather, they argue, the Court's very "decision to deny the defendants' motion to dismiss [has] highlighted the failure of any of the current parties to represent the movants' interests adequately." Mov. Br. 7. Hardly; if an adverse result said anything about adequacy of representation, half of the bar would be inadequate in any given case. The named parties, according to the movants, "are not concerned with the effects of the present litigation on the viability or logistics of incumbent Congressional candidates' re-election campaigns." *Id.* at 8. Nor should they be.

In addition, the movants fail to acknowledge the fact that defendants are represented by the State of Wisconsin and its Department of Justice. The Attorney General has a constitutional and statutory duty to defend the statutes. *See* Wis. Stat. § 165.25(1) (2009-10); *State Pub. Intervenor v. Wis. Dep't of Natural Res.*, 115 Wis. 2d 28, 37, 339 N.W.2d 324 (1983). That alone makes intervention both unwarranted legally and unwise practically. Indeed, it forecloses the motion. The Attorney General's defense carries a presumption of adequacy. "Adequacy can be presumed when the party on whose behalf the applicant seeks intervention is a governmental

body or officer charged by law with representing the interests of the proposed intervenor." *Keith*, 764 F.2d at 1270. Notwithstanding the "failure" of the state's motion to dismiss, the Attorney General hardly provides inadequate representation. Whether or not the Congressmen shared the same political affiliation as the Attorney General, whether or not the Congressmen helped elect him, he has a statutory and constitutional duty to represent them—and every other citizen—adequately. Since "there [i]s nothing to indicate that the attorney general [i]s planning to throw the case," the motion should "properly . . . be[] denied on the ground that the state's attorney general [i]s defending the statute and that adding another defendant would simply complicate the litigation." *Flying J., Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009). Precisely.

II. PERMISSIVE INTERVENTION SHOULD BE DENIED.

Permissive intervention under Rule 24(b) is "entirely discretionary" except for two requirements: "(1) a common question of law or fact, and (2) independent jurisdiction." *Security Ins. Co. v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). Both elements may be satisfied here, but they would be for virtually any intervenor. Although leave to intervene can be granted, it should not be. "When intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears." *Menominee Indian Tribe v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996). Rule 24(b) is "just about economy in litigation." *City of Chicago v. FEMA*, No. 10-3544, 2011 U.S. App. LEXIS 20952, at *18 (7th Cir. Oct. 17, 2011). Denying the motion will not spawn further litigation, but granting it will open wide the doors for prospective intervenors; economy in litigation is preserved only by denial.

This motion carries with it no limiting principle. Only eight citizens (the Congressmen and their three Democratic counterparts), in the movants' view, share their "particular interest" in "how and when to campaign and how and when to seek volunteer and voter support." Mov.

Br. 6. Not so. Any person thinking about challenging these eight incumbents has the same interest. And the interests are not limited to federal campaigns. All state elected officials, and any person thinking of challenging a state elected official—indeed, any person considering voting—have the same interests. Any political party, political organization, interest group, organization or—in the wake of *Citizens United*—corporation has the same interest.

It is no solace to say that these movants are prepared "to litigate as if they were a single intervenor." Mov. Br. 10. Where does the Court draw the line? These five yes but the three other Congressmen no? The Republican Party yes but the Democratic or Independent Party no? The Sierra Club yes but the National Rifle Association no? The interests here are far broader and ecumenical than the "logistics of incumbent Congressional candidates' re-election campaigns." *Id.* at 8. To argue otherwise misses the point of *Baker v. Carr*, 369 U.S. 186 (1962), and the long subsequent line of "one person-one vote" decisions.[2]

CONCLUSION

Intervention is designed to accommodate "two competing policies": "resolving all related issues in one lawsuit" and "keeping a single lawsuit from becoming unnecessarily complex, unwieldy or prolonged." *Shea v. Angulo*, 19 F.3d 343, 349 (7th Cir. 1994). Here these "'competing policies' are not in competition at all." *Id.* This Court, by denying the motion, will allow all issues to be resolved in a single, streamlined litigation. The motion should be denied.

Dated: November 17, 2011.

s/ Rebecca Kathryn Mason
Rebecca Kathryn Mason
State Bar No. 1055500

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[2] The Congressmen, in a footnote, recall that ten years ago three of them successfully moved to intervene in the redistricting case before that three-judge panel. Mov. Br. 2 n.1. They did. The footnote does not recall, however, that there was no statute to defend there. *See Arrington v. Elections Board*, 173 F. Supp. 2d 856, 858 (E.D. Wis. 2001). The state had failed to adopt legislation, leaving the responsibility to the court. While it may have made sense to permit intervention then, giving the court a range of proposals to consider as a remedy, there is no similar need now—at least not yet. Plaintiffs do not oppose *amicus* status for the Congressmen or their ability to resubmit their motion should it be necessary for the Court to consider competing redistricting plans.